SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

V1300CR201080049

STATE'S MOTION TO PRECLUDE QUESTIONS RELATING TO MATTERS OUTSIDE THE KNOWLEDGE OF A WITNESS

MOTION TO PRECLUDE IRRELEVANT EVIDENCE

Division PTB

The State of Arizona, by and through undersigned counsel, respectfully moves to preclude questions from Defendant of witnesses on the topics below. The questions are beyond the personal knowledge of certain witnesses and irrelevant. The specific evidence at issue includes:

1. Evidence relating to the tax status of Angel Valley Spiritual Retreat Center and/or the tax status of the Hamiltons.
2. Evidence relating to the Hamilton's religious affiliations.
3. Evidence relating to building permits at Angel Valley Spiritual Retreat Center.

4. Evidence relating to the bankruptcy filed by the Hamiltons.

5. Evidence relating to the lawsuit against Defendant and Angel Valley by Ivan H. Lewis, et al., in United States District Court, District of Arizona Cause No. CV-09-8196, which was dismissed with prejudice on October 29, 2010.

This request is further supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Defendant should be precluded from asking a witness questions relating to matters outside of their personal knowledge.

Rule 602, Ariz. R. Evid., precludes a witness from testifying to "a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, Ariz. R. Evid. Despite this well established rule, in Defendant's cross examination of Ted Mercer, counsel for Defendant posed questions relating to matters plainly outside of the witness's personal knowledge. These questions included questions relating to the tax status of Angel Valley Spiritual Retreat Center and the Hamiltons, the income the Hamiltons received from the Spiritual Warrior event, the Hamiltons' religious affiliation and status as ministers, and whether the sweat lodge structure was a permitted structure under the Yavapai County Building Code. With the exception of the contract between Angel Valley and James Ray International documenting how much the Hamiltons received for Spiritual Warrior 2009 (to which Mr. Mercer was clearly not a party), there has been no evidence admitted in support of any of these collateral issues.

In response to each question, Mr. Mercer answered that he had no personal knowledge of the subject matter of the questions. As a result of Defendant's questioning, the jury has now heard

evidence of collateral and inadmissible matters. The State respectfully requests this Court to preclude Defendant from posing questions to any witness relating to matters outside of their personal knowledge.

B. Defendant should be precluded from introducing irrelevant evidence related to the Hamiltons and Angel Valley Spiritual Retreat Center.

Based on the questions posed to Mr. Mercer, the State believes Defendant intends to question the Hamiltons on multiple matters that have no relevance to Defendant's guilt or innocence in this case. Rule 403, Ariz. R. Evid.

In *State v. Gibson,* 202 Ariz. 321, 44 P.3d 1001 (2002), the court considered the proper analysis for the admissibility of third-party culpability evidence and noted that like all evidence, the analysis must occur pursuant to Rules 401, 402, and 403, Ariz. R. Evid. First, the evidence must be relevant.

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. "All relevant evidence is admissible.... Evidence which is not relevant is not admissible." Rule 402. Once the evidence is determined relevant, it is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403.

Id. at 323, 44 P.3d at 1003.

Relying on *Winfield v. United States,* 676 A.2d 1, 4 (D.C.1996), the *Gibson* court "concluded that the proper focus should be on 'the effect the evidence has upon the defendant's culpability.'" (citation omitted.) "To be relevant, the evidence must *tend* to create a reasonable doubt as to defendant's guilt." *Id.* at 324, 44 P.3d at 1004. There is nothing in the evidence

Defendant wishes to introduce against the Hamiltons that meets this standard of relevance.

As noted by the court in *Gibson:*

> When applying the balancing test under Rule 403, ARIZONA PRACTICE: LAW OF EVIDENCE should be considered:
>
> > [I]t is first necessary to assess the probative value of the evidence on the issue for which it is offered. The greater the probative value, of course, and the more significant in the case the issue to which it is addressed, the less probable that factors of prejudice or confusion can substantially outweigh the value of the evidence.

Id.

Regarding the remaining factors in Rule 403, confusion of the issues, misleading the jury and wasting time, the *Gibson* court noted:

> The notion here is that, in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that ***the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data*** from which it will be difficult to extract the kernel of controversy.

Id., citing 1 Joseph M. Livermore, Robert Bartels, & Anne Holt Hameroff, ARIZONA PRACTICE: LAW OF EVIDENCE [] § 403 AT 82-83, 84-86 (4th ed. 2000) (quoting 2 WIGMORE ON EVIDENCE § 443 AT 528-529 (CHADBOURN REV. 1979)) (emphasis added).

"Evidence which is not relevant is not admissible." Rule 402, Ariz. R. Evid. The Hamiltons' tax status, religious affiliations, and bankruptcy history have no probative value, are not relevant and the admission of this type of evidence will only serve to confuse the issues, mislead the jury and waste time.

(1) Evidence relating to the tax-exempt status of Angel Valley Spiritual Retreat Center and religious affiliations of the Hamiltons.

Whether or not Angel Valley Spiritual Retreat Center is licensed as a religious facility for tax purposes and whether the Hamiltons are licensed ministers has no relevance in this case. Rule 610, Ariz. R. Evid., prohibits the admission of evidence of the beliefs or opinions of a witness on matters of religion for the purpose of showing "the witness's credibility is impaired or enhanced." Despite the plain language of this rule, it appears Defendant intends to elicit this testimony to imply the Hamiltons are using their religious affiliations in order to obtain a benefit under the tax code. Such purpose is prohibited under Rule 610 and is not relevant to Defendant's culpability.

(2) Evidence relating to building code permits at Angel Valley Spiritual Valley Retreat Center.

Admitting evidence relating to building code permits will essentially put the Hamiltons on trial. The State has disclosed numerous documents related to building permits for the various structures at Angel Valley. The sweat lodge structure was essentially a wooden frame except for the short periods of time when it was in use. The sweat lodge structure did not have a permit. However, this information is not relevant to Defendant's guilt or innocence. To find otherwise, would allow a defendant in a homicide occurring in a rented apartment to try the landlord on the condition of the building. It is not relevant, lacks any probative value and would only serve to confuse the jury.

3. Evidence relating to the Hamiltons' pending bankruptcy is irrelevant and should not be admitted.

The Hamiltons have filed for bankruptcy. Under the facts of this case, evidence of the Hamiltons or any witness's bankruptcy is not relevant and should not be allowed.

4. Evidence relating to a lawsuit previously dismissed with prejudice should not be admitted.

The State has agreed that the fact of a lawsuit pending against Defendant is relevant to a witness's bias and reason for testifying. The Hamiltons do have a lawsuit pending against Defendant. In addition, the Hamiltons have a lawsuit pending against them as a result of the events at Angel Valley Spiritual Retreat Center on October 8, 2009. By information and belief, the State believes Defendant has settled out-of-court the demands of the same parties seeking damages against the Hamiltons. The State currently has a motion to compel disclosure of the civil lawsuits filed against Defendant in order to effectively prepare and respond to Defendant's use of the lawsuits during trial.

Both the Hamiltons and Defendant were parties to a lawsuit filed by several Native Americans alleging they "copied, duplicated and utilized the Native Americans' Sweat Lodge and ceremony strictly for their own personal gain and commercial profits, in violation of the Indian Arts and Crafts Act ("IACA"), 25 U.S.C. § 305e. This lawsuit has been dismissed with prejudice. *See Exhibit A, Order,* 10/29/10.

A lawsuit that has been dismissed with prejudice has no relevance and should not be admitted. The fact of the pending lawsuits may be admissible for the limited purpose of establishing bias.

RESPECTFULLY submitted this 11th day of April, 2011.

By Sheila S Polk
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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ivan H. Lewis, et al., Plaintiffs, vs. James Ray, et al., Defendants.	No. CV-09-8196-PCT-FJM **ORDER**

We have before us defendants' motion to dismiss (doc. 38), plaintiffs' response (doc. 45), and defendants' reply (doc. 46). Plaintiffs allege that defendants "copied, duplicated, and utilized the Native Americans' Sweat Lodge and ceremony strictly for their own personal gain and commercial profits," in violation of the Indian Arts and Crafts Act ("IACA"), 25 U.S.C. § 305e. Plaintiffs contend that defendants copied Native American ceremonial structures and designs, and impersonated Native American traditions and customs. Defendants move to dismiss on the grounds that plaintiffs have failed to properly effectuate service, lack standing, and have not stated a claim upon which relief can be granted.

We first consider defendants' contention that plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs' complaint must contain "well-pleaded factual allegations," which "plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, __ U.S. __, __, 129 S.Ct. 1937, 1950 (2009). Under the IACA, plaintiffs must show that

defendants (1) offered or displayed for sale a good, (2) "in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization." 25 U.S.C. § 305e(b). The Indian Arts and Crafts Board ("Board"), which the IACA vested with the power to prescribe rules and regulations for "the effective execution and administration" of its powers, 25 U.S.C. § 305b, has defined an "Indian product" as "any art or craft product made by an Indian." 25 C.F.R. § 309.2(d)(1). The regulations also provide several illustrations of Indian products: "[a]rt made by an Indian," "[c]raftwork made by an Indian," and "[h]andcraft made by an Indian, i.e. an object created with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product." 25 C.F.R. § 309.2(d)(2). The Act "is essentially a truth-in-advertising law designed to prevent marketing products as 'Indian made' when the products are not, in fact, made by Indians as defined by the Act." Indian Arts and Crafts Board, Protection for Products of Indian Art and Craftsmanship, 61 Fed. Reg. 54552 (Oct. 21, 1996).

Pursuant to the language of the statute, plaintiffs cannot state a claim for either the first or second elements of a cause of action. First, plaintiffs do not allege that defendants offered or displayed for sale a "good." Goods are "commodities; wares" or "portable personal property." American Heritage College Dictionary 586 (3d ed. 2000). See e.g., A.R.S. § 47-2105(A) (U.C.C. § 2-105(A)). The sweat lodge experiences that are the subject of plaintiffs' complaint are services, rather than "goods." Second, plaintiffs do not allege that defendants purported to sell an "Indian product." The operation of a sweat lodge is plainly not art, craftwork, or a handcraft. Moreover, the Board explicitly rejected the suggestion that the definition of Indian product should cover "any cultural property of an Indian tribe or moiety and include a reference to a compatible Indian cultural property law." Protection for Products of Indian Art and Craftsmanship, 61 Fed. Reg. 54553. The Board concluded instead that the "focus on the contemporary arts and crafts market is in keeping with the Congressional intent of the Act and the legislated mission of the Indian Arts and Crafts Board—economic growth through the development and promotion of contemporary Indian

arts and crafts." Id.

We cannot extend the IACA beyond "goods" purported to be "Indian products" to also cover "services." To do so would clearly violate both the language and purpose of the statute, as well as the Board's regulations. Therefore, plaintiffs' allegations about the sweat lodge ceremonies cannot establish a claim for a violation of the IACA. Accordingly, we need not address defendants' remaining contentions about service of process or plaintiffs' standing.

IT IS ORDERED GRANTING defendants' motion to dismiss (doc. 38). Because it cannot be cured by amendment, plaintiffs' complaint is dismissed with prejudice.

DATED this 29th day of October, 2010.

Frederick J. Martone
Frederick J. Martone
United States District Judge